



State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095
(603) 271-3503 FAX (603) 271-2867



Continental Paving, Inc
One Continental Drive
Londonderry, NH 03053

RE: F.E. Turnpike, Exit 6
Nashua, NH

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
AND HEARING
NO. AF 2000-059**

September 20, 2000

I. Introduction

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Water Division (the "Division") to Continental Paving, Inc. pursuant to RSA 482-A:13 and Env-C 601.05. The Division is proposing that fines totaling \$8,000 be imposed against Continental Paving, Inc. for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. Parties

1. The Department of Environmental Services, Water Division is an administrative agency of the State of New Hampshire, having its principal office at 6 Hazen Drive, Concord, NH.
2. Continental Paving, Inc. ("Continental") is a New Hampshire corporation having a mailing address of One Continental Drive, Londonderry, NH 03053.

III. Summary of Facts and Law Supporting Claim(s)

1. RSA 482-A:13 authorizes the Commissioner of the Department of Environmental Services ("DES") to impose administrative fines of up to \$2,000 per offense for violations of RSA 482-A.
2. Pursuant to RSA 482-A:13, the Commissioner has adopted Env-C 614 to establish the schedule of fines for violations of RSA 482-A, rules adopted under RSA 482-A, and permits issued under RSA 482-A.
3. RSA 482-A:14 provides that failure, neglect or refusal to comply with RSA 482-A or rules adopted under that chapter, or an order or condition of a permit issued under RSA 482-A, and the misrepresentation by any person of a material fact made in connection with any activities regulated or prohibited by RSA 482-A shall be deemed violations of RSA 482-A.
4. The New Hampshire Department of Transportation ("NHDOT") was issued permit No. 1997-01678 under RSA 482-A (the "Permit") for work associated with the construction of a Welcome Center off of Broad Street at Exit 6 in Nashua, New Hampshire (the "Project"). The Project called for work to be performed within the seventy-five (75) foot prime wetland buffer zone of the Nashua River.
5. Continental is a subcontractor of NHDOT for the Project.
6. The Permit incorporates forty-five (45) specific permit conditions. The forty-five (45) specific project conditions include in relevant part the following (numbers correlate to permit condition numbers on the Permit):

Appropriate siltation/erosion/turbidity controls shall be in place prior to construction, shall be maintained during construction, and shall remain until the area is stabilized.

4. Construction limit fence shall be installed in work areas adjacent to prime wetlands prior to construction and remain until the area is stabilized.
 9. There shall be no further alteration of wetlands or surface waters without amendment of this permit.
 14. Extreme precautions to be taken within riparian areas to limit unnecessary removal of vegetation during road construction and areas cleared of vegetation to be revegetated as quickly as possible.
7. The Nashua River has been identified as a prime wetland by the City of Nashua pursuant to RSA 482-A:15. Under RSA 482-A:15, any municipality "may undertake to designate, map and document prime wetlands lying within its boundaries, or if such areas lie only partly within its boundaries, then that portion lying within its boundaries."
8. Prime wetlands are defined under RSA 482-A:15 as "any areas falling within the jurisdictional definitions of RSA 482-A:3 and RSA 482-A:4 that possess one or more of the values set forth in RSA 482-A:1 and that, because of their size, unspoiled character, fragile condition or other relevant factors, make them of substantial significance."
9. By Inter-Department Communication dated July 3, 2000, the New Hampshire Department of Transportation ("NHDOT") notified DES that an unpermitted drainage ditch had been constructed by Continental. The notification included the following findings:

The construction of the ditch was started a couple of days prior to June 22, 2000 by Continental Paving without prior discussion with the NHDOT Contract Administrator. The ditch was ± 10 feet in width and was ± 140 feet in length, extending from the detention area to the Nashua River. Approximately 40 feet of the ditch extended into the 75-foot prime wetland buffer zone of the Nashua River beyond the permitted impact area, for a total of ± 400 sq. ft. of additional buffer zone impacts. At the outlet of the ditch, the bank was rip-rapped with stone to the water level of the Nashua River. This impacted approximately 120 square feet of the bank.

10. On July 5, 2000, Division personnel inspected the site along the Nashua River in Nashua. Division personnel were accompanied by Ron Crickard, Environmental Coordinator, Bureau of Construction of NHDOT, William Hauser, Bureau Administrator, Bureau of Environment of NHDOT, Marc G. Laurin, Senior Environmental Manager, Bureau of Environment of NHDOT, Gerald Maher, Project Superintendent for Continental, Bruce Bauer, Project Manager of Continental, and Rick Charbonneau, President of Continental.

The inspection revealed the following:

- a) A drainage ditch had been constructed from a detention pond located within the construction zone to the Nashua River. The drainage ditch was not shown on the Project's plans nor was it authorized under the Permit.
- b) At the time of the inspection, portions of the drainage ditch had been filled with dirt and the ditch was no longer actively draining water from the detention pond.

- c) Portions of the remaining drainage ditch were lined with stone
- d) Rip rap in a trapezoid configuration was observed in the bank of the Nashua River with approximate dimensions of twelve (12) feet along the Nashua River, twenty-six (26) feet on each side, and twenty-five (25) feet wide along the Bank.
- e) Rip rap also was observed in the bank of the Nashua River along the path of the drainage ditch.
- f) Rip rap also was observed within the twenty (20) foot buffer zone required under the Permit. This rip rap was also located within the seventy-five (75) foot prime wetland buffer zone of the Nashua River.
- g) The silt fence parallel to the Nashua River was breached in the location of the drainage ditch and the drainage ditch extended past the silt fence to the edge of the Nashua River.
- h) Riparian vegetation in the bank of the Nashua River had been removed in the area disturbed for the construction of the drainage ditch.

12. Env-Wt 101.04 defines a bank as "the transitional slope immediately adjacent to the edge of a surface water body, the upper limit of which is usually defined by a break in slope. . . ."

13. Env-Wt 303.02(f) defines a Major Project as "projects located in or adjacent to designated prime wetlands under RSA 482-A:15."

14. RSA 482-A:3, I states that no person shall "excavate, remove, fill, dredge or construct any structures in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state without a permit from [DES]."

15. Env-C 614.05(a)(2) defines a Class IV Violation as including "unauthorized dredge, removal, or excavation that involves: . . . any work, regardless of square foot amount, in undeveloped upland of a tidal buffer; tidal wetlands, flats, or waters; bogs; or in or adjacent to prime wetlands."

16. Env-C 614.05(b)(3) defines a Class IV Violation as including "unauthorized fill that involves: . . any work in undeveloped upland of a tidal buffer zone; tidal wetlands, flats, or waters; bogs; or in or adjacent to prime wetlands."

17. Env-C 614.05(h) defines a Class IV Violation as including "failing to use or maintain appropriate siltation and erosion control devices for any construction project in or adjacent to surface waters or prime wetlands."

18. Env-C 614.08(d) allows the Commissioner to assess separate fines "against a party for unauthorized work performed on a given property for . . . unauthorized work constituting violations of separate conditions of a permit, order, or approval."

19. Env-C 614.05 authorizes a fine of \$2,000 for Class IV violations.

IV. Violations Alleged

1. Continental has violated the Permit by failing to maintain appropriate siltation/erosion/turbidity controls in or adjacent to wetlands designated as prime by a municipality, as required by Condition #1
2. Continental has violated the Permit by failing to install construction limit fencing in or adjacent to wetlands designated as prime by a municipality as required by Condition #4 of the Permit.
3. Continental has violated RSA 482-A:3, I and Condition #9 of the Permit by excavating and filling in or adjacent to wetlands designated prime by a municipality without a new permit or permit amendment from DES.
4. Continental has violated the Permit by removing vegetation within riparian areas in or adjacent to wetlands designated as prime by a municipality as prohibited by Condition #14 of the Permit.

V. Proposed Administrative Fines

1. For the violation identified in IV.1. above, Env-C 614.05(h) specifies a fine of \$2,000.
2. For the violation identified in IV.2. above, Env-C 614.05(h) specifies a fine of \$2,000.
3. For the violation identified in IV.3. above, Env-C 614.05(a)(2) and Env-C 614.05(b)(3) specifies a fine of \$2,000.
4. For the violation identified in IV.4. above, Env-C 614.05(a)(2) specifies a fine of \$2,000.

The total fine being sought is \$8,000

VI. Hearing, Required Response

Continental has the right to a hearing to contest the Division's allegations before the fine is imposed. A hearing on this matter has been scheduled for **Monday, October 23, 2000 at 10:30 a.m. in Room C-313** of the Division offices at **6 Hazen Drive** in Concord, NH.

Pursuant to Env-C 601.06, Continental is required to respond to this notice. Please respond no later than October 13, 2000, using the enclosed form as follows:

1. If Continental plans to attend the hearing, please have an authorized representative sign the appearance (upper portion) and return it to James Ballentine, DES Enforcement Paralegal, at the address noted on the form.
2. If Continental chooses to waive the hearing and pay the proposed fine, please have an authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to Mr. Ballentine.
3. If Continental wishes to discuss the possibility of settling the case, please have an authorized representative sign the appearance and return it to Mr. Ballentine and call Mr. Ballentine to indicate Continental's interest in settling.

Continental is not required to be represented by an attorney. If Continental chooses to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

If Continental wishes to have a hearing but is unable to send an authorized representative to the hearing as scheduled, Continental must notify Mr. Ballentine at least one week in advance of the hearing and request that the hearing be rescheduled. If Continental does not notify Mr. Ballentine in advance and does not have an authorized representative attend the hearing, the hearing will be conducted in Continental's absence in accordance with Env-C 204.09.

VII. Determination of Liability for Administrative Fines

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that Continental committed the violation(s) alleged and that the total amount of fine(s) sought is the appropriate amount under the applicable statute and rules. Proving something by "a preponderance of the evidence" means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that Continental committed the violation(s) and that the amount of fine(s) sought is the appropriate amount under the applicable statute and rules, then the fine(s) sought will be imposed, subject to the following:

Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that Continental proves, by a preponderance of the evidence, applies in this case:**

1. The violation was a one-time or non-continuing violation, **and** Continental did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** Continental did not benefit financially, whether directly or indirectly, from the violation.
2. At the time the violation was committed, Continental was making a good faith effort to comply with the requirement that was violated.
3. Continental has no history of non-compliance with the statutes or rules implemented by the Division or with any permit issued by the Division or contract entered into with DES.
4. Other information exists which is favorable to Continental's case which was not known to the Division at the time the fine was imposed.

******* IMPORTANT NOTICE *******

The hearing that has been scheduled is a formal hearing. The hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that you committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is Continental's opportunity to present testimony and evidence that Continental did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If Continental has any evidence, such as photographs,

business records or other documents, that Continental believes show that Continental did not commit the violation(s) or that otherwise support Continental's position, Continental should bring the evidence to the hearing. Continental may also bring witnesses (other people) to the hearing to testify on Continental's behalf.

If Continental wishes to have an informal meeting to discuss the issues, Continental must contact Mr. Ballentine at (603) 271-6072 to request a prehearing conference.

Information regarding this proposed fine may be made available to the public via DES's Web page (www.des.state.nh.us). If Continental has any questions about this matter, please contact James Ballentine, DES Enforcement Paralegal, at (603) 271-6072.

Sincerely,

COPY

Rene Pelletier, Manager
Land Resources Management Program

Enclosure: (NHDES Fact sheet #CO-2 1998)

cc: Gretchen Rule, DES Enforcement Coordinator
Susan Alexant, DES Rules & Hearings Attorney
Nashua Conservation Commission
Nashua Board of Selectmen
Harry T. Stewart, P.E., Director
Marjory Swope, NHACC
Maher, Gerald - Proj Supt Continental Paving Inc
Bureau Of Environment NH Dept Of Transportation
Bauer, Bruce - Proj Mgr Continental Paving Inc
Bureau Of Environment NH Dept Of Transportation
Construction Bureau NH Dept Of Transportation
Richard W. Head, Wetlands Bureau Compliance Supervisor
Margaret Foss, Wetlands Bureau, Enforcement Investigator
Jennifer Patterson, DOJ/EPB

*** Return This Page Only ***

Appearance

____ I/We will attend the hearing scheduled for **Monday, October 23, 2000 at 10:30 a.m.** in **Room C-313** of the DES offices at **6 Hazen Drive** in Concord, NH.

Signature

Date

NAME: (print or type): _____

Title: _____

Waiver of Hearing

____ I/We certify that I/we understand my/our right to a hearing regarding the imposition of the proposed administrative fine and that I/we hereby waive those rights. The fine payment in the amount of \$8,000 paid to "Treasurer, State of New Hampshire" is enclosed*

If you pay by check, draft, or money order that is returned due to insufficient funds, state law RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft or money order.

Signature

Date

NAME: (print or type): _____

Title

RETURN THIS PAGE ONLY TO:

James Ballentine, DES Enforcement Paralegal
Department of Environmental Services
6 Hazen Drive
PO Box 95
Concord, NH 03302-0095